

FEDERAL MAGISTRATES COURT OF AUSTRALIA

REGINALD MORRIS FARRARE JR v MINISTER FOR IMMIGRATION & ANOR [2012] FMCA 405

MIGRATION – Review of decision of Migration Review Tribunal – whether the decision of the delegate to refuse the applicant’s application for a Temporary Partner visa and a Permanent Partner visa was sent to the last address for service notified to the Department of Immigration and Citizenship – Tribunal was correct to find that it had no jurisdiction to consider the review – no jurisdictional error – application dismissed.

Judiciary Act 1903 (Cth), s.39B
Migration Act 1958 (Cth), ss.347, 474, 494B, 494C, Pt.8
Migration Regulations 1994 (Cth), reg.4.10

Liu v Minister for Immigration & Anor (2010) 240 FLR 202

Applicant:	REGINALD MORRIS FARRARE JR
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 2276 of 2011
Judgment of:	Emmett FM
Hearing date:	30 March 2012
Date of Last Submission:	18 April 2012
Delivered at:	Sydney
Delivered on:	15 May 2012

REPRESENTATION

Counsel for the Applicant: Mr D Godwin

Solicitors for the Applicant: Legal Aid NSW

Counsel for the Respondents: Mr D Hughes

Solicitors for the Respondents: Clayton Utz

ORDERS

- (1) The proceeding before this Court, commenced by way of application filed on 7 October 2011, is dismissed.
- (2) The applicant pay the costs of the first respondent fixed in the amount of \$18,000.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY**

SYG 2276 of 2011

REGINALD MORRIS FARRARE JR
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application made pursuant to s.39B of the *Judiciary Act 1903* (Cth) and Pt.8 Div.2 of the *Migration Act 1958* (Cth) (“**the Act**”) for judicial review of a decision of the Migration Review Tribunal (“**the Tribunal**”) dated 15 September 2011 and handed down on 16 September 2011.
2. The applicant is a citizen of the United States of America (“**the Applicant**”).
3. The issue in this case is whether the decision of a delegate of the First Respondent (“**the Delegate**”), which refused the Applicant’s visa application, was sent to the Applicant at the last residential address notified by him to the Department of Immigration and Citizenship (“**the Department**”). This issue is considered below in the context of

considering whether the Tribunal's decision is affected by jurisdictional error.

4. Prior to considering the proceeding before this Court, these reasons provide the relevant procedural background, a summary of the Applicant's visa application claims, a summary of the decision of the Delegate, and a summary of the Tribunal's review and decision.

Background

5. On 27 June 2008, the Applicant arrived in Australia with a visitor visa subclass 976, which remained valid until 27 September 2008. The Applicant departed legally from the United States of America on a passport issued in his own name.
6. On 25 September 2008, the Applicant applied for a Partner (Temporary) (Class UK) visa, subclasses 820 and 826 ("**Temporary Partner Visa**"), and a Partner (Residence) (Class BS) visa, subclasses 801 and 814 ("**Permanent Partner Visa**").
7. On 14 December 2010, the Delegate refused the Applicant's application for a Temporary Partner visa and a Permanent Partner visa.
8. On 8 February 2011, the Applicant lodged an application for review of the Delegate's decision by the Tribunal.
9. On 15 September 2011, the Tribunal found that it did not have jurisdiction to consider the review.
10. On 7 October 2011, the Applicant filed an application in this Court seeking judicial review of the Tribunal's decision.

The Applicant's visa applications

11. The Applicant provided a statement in support of his application for a Temporary Partner visa and Permanent Partner visa in which he stated:
 - a) The Applicant and his sponsor, Christine Habkhouk, met at a music conference in Philadelphia, United States of America on 5 September 2006 and began a relationship six months later.

- b) The Applicant and his sponsor commenced a de facto relationship on 2 September 2007.
- c) On 22 September 2008, the Applicant and his sponsor were married.

The Delegate's decision

- 12. On 25 September 2008, the Delegate wrote to the Applicant acknowledging receipt of the application for the Temporary Partner visa and the Permanent Partner visa, and inviting the Applicant to give further information in relation to the application within 28 calendar days.
- 13. On 8 September 2009, the Delegate wrote to the Applicant inviting the Applicant to give further information in support of his application within 28 calendar days. The Applicant provided no further documents in support of his application for the Temporary Partner visa and the Permanent Partner visa.
- 14. On 10 February 2010, the Delegate wrote again to the Applicant inviting him to give further information in relation to his application within 28 calendar days. Again, the Applicant provided no further documents in support of his application for the Temporary Partner visa and the Permanent Partner visa.
- 15. On 15 September 2010, the Delegate wrote a letter headed "*Final Notice*" inviting the Applicant to give further information in relation to his application within 28 calendar days. Once more, the Applicant provided no further documents in support of his application.
- 16. The Delegate found that there was no material provided by the Applicant to suggest the pooling of resources, joint liabilities, legal obligations or the sharing of day-to-day household expenses with his sponsor, beyond a copy of a residential rental agreement in their names.
- 17. The Delegate also found that the Applicant did not provide any evidence of cohabitation with his sponsor, despite the rental agreement, and that there was no evidence to show that the Applicant and his sponsor had ever lived at the rented premises.

18. The Delegate was not satisfied that the Applicant and his sponsor were recognised socially as a couple and found that there was insufficient evidence to indicate the level of commitment of the Applicant and his sponsor to a genuine and continuing relationship.
19. On 14 December 2010, the Delegate refused the Applicant's visa applications on the basis that the Applicant did not meet the criteria for the grant of the Temporary Partner visa and the Permanent Partner visa.

The Tribunal's review and decision

20. On 8 February 2011, the Applicant lodged an application for review of the Delegate's decision by the Tribunal.
21. The Applicant provided further documents in support of his application for the Temporary Partner visa and the Permanent Partner visa.
22. The Tribunal formed the primary view that it did not have jurisdiction because the application for review was not received within the prescribed period for lodgement. The Tribunal wrote to the Applicant on 23 August 2011 inviting submissions on the issue. On 1 September 2011, the Tribunal received a written submission from the Applicant.
23. The Tribunal found that the prescribed period for the seeking of review of an MRT reviewable decision was 21 days from valid notification of the decision to the Applicant.
24. The Delegate's decision was sent by pre-paid registered post and the Tribunal noted that it made enquiries with the Department to determine whether the letter was sent within three days of the date of the letter. Following consideration of the material before it, the Tribunal was satisfied that the decision notification was despatched by pre-paid post on 15 December 2010.
25. The Tribunal was also satisfied that the contents of the Delegate's decision notice complied with the requirements of s.66(2) of the Act.
26. The Tribunal found that the decision notice was sent to the correct address in accordance with ss.66(1) and 494B(4) of the Act and, in the circumstances, the Applicant was taken to have received the notice on 23 December 2010, being seven working days after the date of the

notice, even though the notice was returned unclaimed to the Department.

27. The address to which the notification notice was sent to was the address provided by the Applicant on 25 September 2008 (“**the Mascot Street address**”). The Tribunal found that address to be the last residential address provided to the Department by the Applicant for the purposes of receiving documents.
28. The Tribunal had regard to a written submission by the Applicant that the decision was sent to the wrong address and that the Applicant only became aware of the decision on 3 February 2011. The Tribunal noted that in an earlier submission received by it on 10 February 2011, the Applicant had stated that he became aware of the decision on 4 February 2011.
29. The Tribunal did note that the Departmental record showed that the Applicant telephoned the Department on 4 February 2011 and provided details of his address at 1/116 Blackwell Road, Woy Woy, NSW, 2256 (“**the Blackwell Road address**”). However, the Tribunal found that, on 14 December 2010, the last residential address provided by the Applicant to the Minister for the purposes of receiving documents was the Mascot Street address.
30. The Tribunal found that the Applicant was deemed to have received notification of the decision on 23 December 2010 and had only until 13 January 2011 to lodge an application for review. The application for review was not lodged with the Tribunal until 10 February 2011, which was after the prescribed period had expired.
31. Accordingly, the Tribunal concluded that it had no jurisdiction to review the Delegate’s decision.

The proceeding before this Court

32. The Applicant was represented before this Court by Mr Godwin of counsel.

33. By consent, leave was given to the Applicant at the commencement of the hearing to rely on a second further amended application for review identifying the following ground of review:

“The second respondent MRT erred in concluding that it did not have jurisdiction as the applicant had not been notified of the decision until 4 February 2011.

Particulars

There was no effective notification of the decision in December 2010 as the address to which the notice was addressed and posted was not the last residential address provided by the Applicant to the Department of Immigration.”

34. Counsel for the Applicant tendered two bundles of documents being the Court Book, filed on 23 November 2011, and the Department’s file, which were marked Exhibit 1A and Exhibit 2A respectively. Counsel for the Applicant also read an affidavit of the Applicant, sworn 25 January 2012 and an affidavit of his sponsor, now wife, Christine Farrare, sworn 24 January 2012.
35. The First Respondent read the affidavits of Daniel Li, affirmed 22 February 2012, being the Applicant’s case officer within the Department; Fiona McCulloch, affirmed 24 February 2012, being the Director of Program Delivery with the Department; Michael Cymbalista, sworn 24 February 2012, being the Acting Director of the Client Service’s Operation section of the Department; and, a further affidavit of Fiona McCulloch, affirmed 30 November 2012.
36. Various objections were made by the parties to the affidavits and rulings made by me at that time.
37. In support of the application, the Applicant and his wife both gave evidence at the hearing and were cross-examined. In support of the response, Ms McCulloch and Mr Li gave evidence and were cross-examined.

The evidence

38. The Applicant on several occasions agreed that he had read the documents provided to him by the Department carefully, including his

visa application, and was aware of his responsibility to keep the Department fully informed as to his current contact details.

39. On his visa application, the Applicant gave his current residential address as the Mascot Street address. He also supplied a copy of a rental agreement for those premises dated 7 August 2008 with a term expiring on 4 February 2009.
40. In answer to question 30 on his visa application, “*Do you agree to the Department contacting you by facsimile, email or other electronic means?*”, the Applicant answered “Yes” and provided an email address and contact mobile telephone number.
41. On 17 September 2009, the Applicant and his wife moved to the Blackwell Road address.
42. The Applicant gave evidence that he informed the Department by telephone on or about **28 August 2009** that he was about to move to the Blackwell Road address. The Applicant stated that when he spoke to the Department on or about 28 August 2009, he was told that the Department could not update his address at that time because he had not yet moved to the Blackwell Road address, but that a note would be put on the Department’s system and his address updated from 17 September 2009. The Applicant said he did not inform the Department in writing.
43. The telephone call made by the Applicant on or around 28 August 2009 was made on a Vodafone pre-paid mobile telephone which belonged either to himself or his wife.
44. The Applicant’s wife gave evidence that on 28 August 2009 she told the Applicant that he should update the address “*with Immigration*” having rung Foxtel and Energy Australia to change their address to the Blackwell Road address. The Applicant’s wife said that the move to the Blackwell Road address occurred on 17 September 2009.
45. The First Respondent tendered the telephone records of the mobile telephone numbers identified by the Applicant. They do not show that any telephone call was made either on the Applicant’s telephone number or the Applicant’s wife’s mobile telephone number on or around 28 August 2009.

46. The Applicant gave some confusing evidence by way of explanation in relation to telephone numbers that he identified on the telephone records. He said that the telephone number that he was ringing was not in fact the telephone number recorded on the telephone records.
47. There was no other evidence to support or corroborate what the Applicant said in relation to those telephone numbers.
48. None of the Department's files, being Exhibit 1A and Exhibit 2A, disclose any file note of a telephone call received from the Applicant, prior to 4 February 2011, seeking to update his contact details to the Blackwell Road address.
49. The First Respondent relied on evidence from both Ms McCulloch and Mr Li that the Department maintains an electronic database in which all communications with visa applicants are recorded on the database, known as the ICSE database. The First Respondent relied on a screen shot from the ICSE database showing the Applicant's address as the Mascot Street address. A copy of that screen shot was annexed to the affidavit of Ms McCulloch, affirmed 24 February 2012. Ms McCulloch deposed that the screen shot demonstrated that the Applicant's home address was the Mascot Street address for the period 25 September 2008 to 4 February 2011, after which the Blackwell Road address was added into the ICSE database.
50. There is no record of any telephone call from the Applicant on or around 28 August 2009 on the ICSE database. The only records in the ICSE database are those referred to above.
51. Counsel for the Applicant submitted that the ICSE database records are not reliable and the Court should not be satisfied on that evidence alone that the Applicant did not make a telephone call on or around 28 August 2009 providing his new contact details to the Department.
52. In relation to the Applicant's assertion that he telephoned the Department on or around 28 August 2009 and gave them his change of address details, the First Respondent also relied on evidence from Mr Cymbalista, Acting Director of Client Service Operations section since 8 February 2012, and prior to that Assistant Director of Client Service Operations section from July 2009.

53. Mr Cymbalista deposed in his affidavit, sworn 24 February 2012, that in August 2009 the Department could not have accepted a change of address from an applicant over the telephone and that, at that time, callers who wished to change their contact details were required to fill out a form and return it completed to the Department. Mr Cymbalista's evidence was not challenged.
54. In the circumstances, I am satisfied on the balance of probabilities that there was no telephone call made by the Applicant on either his mobile telephone or the Applicant's wife's mobile telephone to the Department on or around 28 August 2009 as alleged.
55. The Applicant also gave evidence that he contacted the Department on **9 October 2009** in order to ask if it was necessary for him to obtain an Australian Federal Police ("**AFP**") check. The Department's records confirm that the Applicant spoke to an employee and noted that he had indeed applied for an overseas police clearance and an AFP check.
56. The Applicant also gave evidence that in early **October 2009** he was contacted by Mr Li from the Department who told him that health check information was required as well as documentation confirming that he and his wife were a couple.
57. The Applicant stated that Mr Li did not confirm his current address details during that conversation.
58. Mr Li gave evidence that he did not recall any such conversation with the Applicant and that there was no record of any conversation between himself and the Applicant on the ICSE database during the month of October 2009. Mr Li said that it was an invariable practice to make a note of telephone conversations with visa applicants on the ICSE database. Further, Mr Li noted that he sent the Applicant a letter dated 8 September 2009 requesting further information within 28 calendar days and informing the Applicant that he was taken to have received that request seven working days after the date of the letter. Mr Li stated that the timeframe for the Applicant to respond, namely 35 calendar days, had not yet expired in early October 2009, and that he would not contact an applicant before the period had expired to make a request that had already been made in writing.

59. However, the Applicant said that on **18 December 2009** he had a conversation with a female from the Department in relation to where he should send his health check information.
60. Counsel for the Applicant submitted that the Court should be satisfied that the Applicant did not confirm the Mascot Street address in the conversation on 18 December 2009 because he denies that he did so and the evidence is that he had not lived at this address since 17 September 2009. Counsel for the Applicant submitted that it may be that after the conversation concluded the Department employee found the Applicant on the ICSE and inserted the address details; or that address details may have been automatically “*populated*” after the client ID number was inserted. Counsel for the Applicant further submitted that no evidence was lead by the First Respondent from the Department employee who had the conversation with the Applicant and no explanation was provided as to whether she remained employed by the Department.
61. On **4 February 2011**, the Applicant telephoned Benjamin Harkin at the Department and was told that the Department only had the facility to orally update address records for the past three or four months. Counsel for the Applicant agreed that that fact was corroborated by Mr Cymbalista.
62. On **4 February 2011**, the Applicant called a female staff member of the Department and was told that only his case officer could orally advise him of the outcome of his visa application. The First Respondent identified this female staff member as Hala Assouad. Ms Assouad’s file note was annexed to the affidavit of Ms McCulloch, sworn 24 February 2012. The file note in respect of the Applicant made by Ms Assouad on 4 February 2011 is as follows:

“... Name: Mr FARRARE JR Reginald Morris - C06: C3/06/1984 - CID: 46670134755 - The above client contacted the MSC today to enquire as to whether is to late to submit the requested documents in relation to their partner visa application.- CSE shows that the visa has been refused and that the decision letter was ‘Returned to Sender’.- I have advised the client not to submit further documents as the decision letter has already been sent out.- The client kindly requested that the decision letter be resent to: U1, 116 BLACKWELL RD WOY WOY NSW 2256.- The

previous address in ICSE was 1/19 Mascot Street Woy Woy NSW 2256. The client states that they have never resided at this address and that may be why the mail was not received by the applicant. The client has updated their address orally.- The Client can be reached on 0449 527 914 should you need to discuss the matter further.- Kind regards, - Hala Assouad - Support and Development Officer - Melbourne Service Centre - Department of Immigration & Citizenship - Phone: 03 9235 2313 - Email: hala.assouad@immi.gov.au.”

63. In summary, the file note discloses that the Applicant contacted the call centre to enquire as to whether it was too late to submit requested documents in relation to his application for a Temporary Partner visa and a Permanent Partner visa, and was advised that a decision had already been made in relation to the application; the Applicant asked that the decision be sent to his new address at the Blackwell Road address; the Applicant stated that he had never resided at the Mascot Road address; the Applicant said that he had updated his address orally. Ms Assouad deposed that the Applicant’s new contact details were updated in ICSE as a result of the information he had provided in this conversation.
64. The Applicant gave evidence that Mr Li called him on **4 February 2011** and said he would post and email the Delegate’s decision to him.
65. A file note by Mr Li is annexed to Ms McCulloch’s affidavit as annexure “C” and simply states “*I emailed the decision notification at his request*”.
66. Mr Li gave evidence that he only ever telephoned the Applicant on one occasion in April 2009 in relation to sending further documents in support of his application for a Temporary Partner visa and a Permanent Partner visa. Mr Li said that he had no independent recollection of any discussion with the Applicant on 4 February 2011.
67. Mr Li stated that he believed that the request to him to send the decision record to the Applicant was made by Ms Assouad and not made by the Applicant.
68. There was no ICSE database entry recording a call from Mr Li to the Applicant or visa versa.

69. Whilst I am not entirely satisfied that the ICSE database is a complete record of all contact made with visa applicants or contact received from visa applicants, I prefer Mr Li's evidence to that of the Applicant in relation to the existence of any telephone discussion with the Applicant on 4 February 2011.

70. Reasoning

71. The issue in this case is whether the Tribunal had jurisdiction to hear the application for review, in circumstances where the Applicant filed his application for review more than 21 days after he was notified of the Tribunal decision to refuse his visa application.

72. The Applicant contends that he was not notified of the decision before February 2011 when he had a conversation with the Department in which he said he was told that the notification of the Tribunal's decision had been sent to the Mascot Street address.

73. It is common ground between the parties that, if the Court was to accept the Applicant's evidence that he informed the Department by telephone on or about 28 August 2009 of his change of address from the Mascot Street address to the Blackwell Road address, then the Tribunal's decision should be set aside for jurisdictional error and the proceeding remitted to the Tribunal for determination according to law.

74. Of particular relevance were the mobile telephone records from Vodafone of the mobile telephone numbers of each of the Applicant and his wife between the periods 20 August 2009 and 20 September 2009. Those records do not disclose any telephone calls made to the Department on or around 28 August 2009. The Applicant gave evidence that some of the telephone numbers listed on the records were not telephone numbers that he had in fact dialled and that computerised records are not always reliable.

75. I reject the Applicant's evidence that the Vodafone telephone records from August 2009 are unreliable because they included numbers that he did not call. I do not accept that he would be able to recollect telephone numbers he called in that period. Nor do I accept the Applicant's confused evidence as to his explanation as to why the Department's telephone number was not recorded in the Vodafone

records. Namely, that the computer generated records do not always disclose the telephone number dialled.

76. The Applicant was made aware in writing from the Department on more than two occasions that it was his responsibility to maintain current contact details with the Department. In cross-examination, the Applicant agreed that he was aware of that obligation.
77. I prefer the evidence of the employees of the Department to that of the Applicant where they depart from the Applicant's evidence. In particular, I am satisfied that if the Applicant had provided his contact details by telephone prior to September 2010, he would have been required to do so in writing by completing a standard form.
78. Further, I am satisfied that had the Applicant provided his contact details after the date when the Department had the facility to receive those changes in contact details by telephone, there would have been a record of such information having been provided to the Department.
79. Neither the Applicant nor his wife were impressive witnesses and, certainly, neither was able to explain satisfactorily why their evidence was not supported by any of the Department's records or by the Vodafone telephone records of each of their respective mobile telephones.
80. Whilst I am prepared to accept that the Applicant may believe that he did make such a telephone call to the Department on or around 28 August 2009, I do not accept that this belief is correct in circumstances where it is otherwise uncorroborated and the only evidence before the Court is to the contrary.
81. Whilst the Applicant's wife corroborates the Applicant's assertion of a telephone call on or around 28 August 2009 to the Department, again, I am prepared to accept that she may now presently believe that such a telephone call occurred, however, I do not accept that her belief is correct.
82. Given the effluxion of time, I am not prepared to make findings that the Applicant and his wife gave evidence that was knowingly false. However, I do not find their evidence reliable to the extent that they

both assert that the Applicant notified the Department on or around 28 August 2009 of their change of address.

83. In the circumstances, I am satisfied that the last residential address provided to the Department by the Applicant for the purpose of receiving documents at the time of notification to the Applicant of the Tribunal's decision was the Mascot Street address.
84. Further, I accept the evidence of the First Respondent that on 18 December 2009, the Applicant confirmed that he lived at the Mascot Street address. In making that finding, I refer to the unchallenged evidence of Mr Cymbalista that the information officer sent an email on 18 December 2009 in accordance with an email template used at the time which required, inter alia, verification of a current address. The address recorded on 18 December 2009 was the Mascot Street address.
85. In such circumstances, the last address provided to the Department by the Applicant for the purposes of receiving documents within the meaning of s.494B(4)(c)(ii) of the Act was on 18 December 2009. It was the Mascot Street address.
86. I am satisfied that it was not until 4 February 2011, that the Department was notified by the Applicant of his change of contact details to the Blackwell Road address.
87. In the circumstances, the First Respondent sent the Delegate's decision to the Applicant in accordance with s.494B(4) of the Act. Accordingly, the Applicant is taken to have received notification of the decision seven working days after the date of the document, pursuant to s.494C(4) of the Act. The words of s.494C(4) have the effect of deeming receipt of the document (see *Liu v Minister for Immigration & Anor* (2010) 240 FLR 202 at 213).
88. In the circumstances, the Applicant is deemed to have received the Delegate's decision on 23 December 2010. Accordingly, pursuant to s.347(1)(b)(i) of the Act and reg.4.10(1)(a) of the *Migration Regulations 1994* (Cth), the Applicant was required to make any application for review by the Tribunal by 13 January 2011.
89. The Applicant did not lodge his application for review of the Delegate's decision by the Tribunal until 10 February 2011. In the

circumstances, the Applicant had not filed his application within the prescribed time limit.

90. The Tribunal found that the Applicant was properly notified of the Delegate's decision and was taken to have been notified on 23 December 2010 and that such period for the lodgement of an application for review ended on 13 January 2011.
91. In the circumstances, the Tribunal correctly found that the application for review was not valid and that the Tribunal had no jurisdiction to conduct the review.
92. Accordingly, the Tribunal affirmed the decision under review. There is no error in the Tribunal's findings and conclusions. No other error is asserted by the Applicant.

Conclusion

93. In circumstances where the Tribunal decision is not affected by jurisdictional error, this Court has no power to intervene in that decision in accordance with s.474 of the Act.
94. Accordingly, the proceeding before this Court commenced by way of application filed on 7 October 2011 is dismissed with costs.

I certify that the preceding ninety-three (93) paragraphs are a true copy of the reasons for judgment of Emmett FM

Date: 15 May 2012